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In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. ~~545 MISC.~~ 110.

THOMAS A. GUSIK, a minor,
by his Father and next friend, JOHN GUSIK,
Petitioner,

vs.

L. C. SCHILDER, Warden,
Federal Reformatory, Chillicothe, Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT OF PETITION.

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L. C. SCHILDER, Warden,
Federal Reformatory, Chillicothe, Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment entered March 20, 1950 in cause No. 10,978 on its docket, entitled L. C. Schilder, Warden, Federal Reformatory, Chillicothe, Ohio, Respondent-Appellant, v. Thomas A. Gusik, a Minor, by his Father and Next Friend, John Gusik, Petitioner-Appellee, wherein the court reversed the decision of the Federal District Court.

A transcript of the record of the case, including proceedings in said Court of Appeals, is furnished herewith in accordance with the rules of this Court.

OPINION BELOW.

The opinion of the Court of Appeals below (R. 575-581) is reported at 180 F. 2d 662, decision being rendered on March 20, 1950. The memorandum opinion of the District Court, March 31, 1949, is reported at pages 17 to 23 of the Record.

JURISDICTION.

This Court has jurisdiction to review the judgment in question upon Writ of Certiorari, under 28 U. S. C. 1254 (1).

STATEMENT.

The petitioner, age 18, was a guard stationed at Tirrenia, Italy, in the Occupation Forces of the United States Army having enlisted at age 17. August 13, 1947, the petitioner was on guard duty at a Supply Depot, the compound of which was enclosed with a wire fence (R. 29, 30). Two thieves were shot and killed at the wire fence while they and several other members of their gang were unlawfully entering into the depot to steal United States property during the night season and while petitioner and other soldiers were on guard duty (R. 35, 36). *The shooting was held to be justifiable homicide and Gusik was restored to guard duty* (R. 39, 151, 269, 272, 536). On September 18, 1947, more than one month later, petitioner was charged with murder. On October 9, 1947, a trial by General Court Martial was held (R. 425-428). Petitioner's assigned defense counsel had only one interview with the petitioner before trial, and said interview lasted 10 minutes (at 10 p.m.) at the Army prison and was conducted less than 48 hours before trial time (R. 56, 541) and constituted the entire preparation of said purported counsel. The trial, including recesses, and the Court's deliberations of guilt and sentence took slightly over three hours to complete (R. 437, 486). The defendant was found guilty and sentenced to a dishonorable discharge and a life sentence at hard labor (R. 486).

After the conviction by the General Court Martial, the trial was reviewed by the Staff Judge Advocate on October 13, 1947 (R. 410-417), who affirmed the conviction and sentence. On the same day, the Commander of the Port of Leghorn approved the sentence, pursuant to his au-

thority under Article of War 50½, 10 U. S. C. 1522 (R. 487). On January 16, 1948, the Board of Review in the Office of the Judge Advocate General submitted its holding (R. 312) and review (R. 313-342) in which the sentence and conviction were affirmed. *The Judge Advocate General* approved the holding of the Board of Review and recommended to the Secretary of the Army that the period of confinement be reduced to sixteen years, in which recommendation the *Secretary of the Army* concurred (R. 312-313). *On January 26, 1948,* General Court Martial Order No. 32 was issued by order of the Secretary of the Army, promulgating the sentence as reduced (R. 343). This was a complete exhaustion of appellate reviews as provided for in Articles 48, 49, 50 and 50½ (10 U. S. C. 1519-22) of the Manual for Courts-Martial 1928, then in effect, no further appeal being provided for.

It was the petitioner's contention that he had been denied due process of law, in violation of the Fifth Amendment. These contentions (the same issues as raised in the Federal District Court) were presented to the Appellate Authorities of the U. S. Army,—the Judge Advocate General's Board of Review. Counsel for petitioner appeared at an oral hearing before the said Board of Review on December 15, 1947.

Thereafter, *on April 27, 1948,* the petitioner filed in the Federal District Court for the Southern District of Ohio, his petition for Writ of Habeas Corpus, alleging in essence, that his conviction and sentence were void by reason of denial of due process of law by the said General Court Martial Board; that he was denied a fair and impartial pre-trial investigation in accordance with Article of War 70 (10 U. S. C. 1542); that he was denied the effective assistance of counsel in violation of Article of War 17 (10 U. S. C. 1488); that he was denied counsel of his own choosing in violation of Article of War 17 (10 U. S. C. 1488); that the Trial Judge Advocate suppressed evidence favor-

able to the accused in violation of Article 17 and *paragraph 41d* of the *Manual for Courts-Martial;* that a purported confession was obtained by coercion in violation of Article of War 24 (10 U. S. C. 1495); that the Judge Advocate General's Board of Review, in an abuse of discretion, failed and refused to grant relief upon review, in violation of Article of War 37; and that said denials of due process were in violation of the Fifth Amendment to the Federal Constitution (R. 1-7).

On *June 17, 1948*, the Warden filed his return to the Writ of Habeas Corpus (R. 9-14) wherein he alleged in substance that the petitioner was convicted by a General Court Martial Board; that the Staff Judge Advocate reviewed and approved said conviction and sentence; that the Commanding Officer, Port of Leghorn, reviewed and approved said conviction and sentence; that the Board of Review in the Office of the Judge Advocate General reviewed and submitted its opinion in writing to the Judge Advocate General wherein it approved the conviction and sentence; that the opinion of the Board of Review was concurred in by the Judge Advocate General who recommended that the period of confinement be reduced to 16 years; and that on January 26, 1948, the sentence as reduced was promulgated by order of the Secretary of the Army. Answering further, the Warden denied the allegations set forth in petitioner's petition, alleging that no errors or irregularities occurred; but that if any errors or irregularities did occur they were not questions or issues for consideration by the District Court; that the Board of Review and the *Judge Advocate General* were the only ones qualified to pass thereupon, pursuant to Article of War 50½, *Manual for Courts-Martial*, 1928, then in effect.

A Traverse was thereafter filed by the petitioner, and upon said issues as drawn by the pleadings, hearing was held by the Federal District Court. Evidence was presented by the petitioner in the District Court on *June 28*,

1948, after which the case was continued to *September 8, 1948*, at which time further proceedings were had before the District Court below. Thereafter, the case was continued again until *January 7, 1949*, at the instance of respondent, after which additional testimony was admitted on behalf of the Warden. On *March 31, 1949*, the District Court below, in a Memorandum Opinion (R. 17-23) found that the petitioner had been deprived of his liberty without due process of law, in that the Court Martial Board did not have jurisdiction to try and sentence the petitioner because: (1) he was denied a fair and impartial pre-trial investigation in compliance with Article of War 70, (2) the Trial Judge Advocate failed to call all material witnesses and thus constituted an act inconsistent with a genuine desire to have the whole truth revealed, as prohibited; and (3) was denied the effective assistance of counsel in violation of Article of War 17. That the total effect of these deprivations constituted denial of due process.

Thereafter, on *May 17, 1949*, the Warden filed his Notice of Appeal to the Sixth Circuit Court of Appeals and in said Appeal set forth the following statement of questions involved:

"I. Did the United States District Court exceed its jurisdiction in hearing this action?

II. Is the pre-trial investigation pursuant to Article of War 70, *Manual for Courts-Martial*, 1928 (10 U. S. C. 1542) an indispensable prerequisite to Army court-martial jurisdiction?

III. Was the conduct of the trial judge advocate in not calling all the witnesses listed on the charge sheet an act inconsistent with a genuine desire to have the whole truth revealed, as prohibited by the *Manual for Courts-Martial*, so as to oust the court-martial of jurisdiction to sentence the petitioner?

IV. Was petitioner denied the effective assistance of counsel so as to oust the court-martial of jurisdiction to sentence the petitioner?

V. Was petitioner deprived of his liberty without due process of law?"

The Warden and the petitioner each submitted briefs covering the questions so involved. Thereafter, on *January 30, 1950, one day* before said case was heard on oral argument by the Sixth Circuit Court of Appeals, the Warden filed a reply brief in which, for the first time in the entire proceedings, he contended that the within petitioner had not exhausted his remedies prior to bringing the within cause in the District Court. The Warden contended that Article of War 53, as amended (10 U. S. C. 1525), effective February 1, 1949, was retroactive in character in that it applied to the within cause, and that failure to exhaust this purported remedy was a defect fatal to the jurisdiction of the District Court.

The Court of Appeals in its opinion (R. 575-581) did not consider or pass upon the merits of the case as adjudicated by the District Court. The Court of Appeals below rested its *reversal* of the District Court on its construction of Article of War 53 as amended (10 U. S. C. 1525). The Court of Appeals held that despite the fact that Article of War 53 as amended (effective February 1, 1949) was not in existence when petitioner filed his cause of action in the Federal District Court (April 27, 1948), or when the evidence was heard (June 1948, Sept. 1948, Jan. 1949),

> "The Writ of Habeas Corpus *was immaturely filed* and improvidently granted."

Without passing upon the merits of the case, the Court of Appeals held that it was incumbent upon the petitioner to file a "Petition for New Trial" pursuant to Article of War 53 as amended before filing a petition for Writ of Habeas Corpus in the Federal District Court. Accordingly, the Court of Appeals reversed the decision of the District Court below "without prejudice to the rights of the appellee to file a new application for a Writ of Habeas Corpus after having applied for the remedy created by amended Article of War 53."

STATUTE INVOLVED.

Article of War 53 (10 U. S. C. 1525), effective February 1, 1949, is set out hereinbelow:

> "Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review; Provided, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later; Provided, That only one such application for a new trial may be entertained with regard to any one case; And provided further, That all action by the Judge Advocate General pursuant to this article and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies and officers of the United States."

QUESTIONS PRESENTED.

The questions presented are:

1. Whether Article of War 53 (10 U. S. C. 1525) is constitutional in view of the proviso that "all action by the Judge Advocate General pursuant to this Article * * * shall be final and conclusive * * * and all action taken pursuant to such proceedings, shall be binding upon all * * * courts * * * of the United States."

2. Whether a voluntary subscription to an unconstitutional statute amounts to a waiver of a constitutional right.

3. Whether Article of War 53, as amended, is retroactive.

4. Whether the *Manual for Court's Martial* and the President's Executive Order therein prohibits retroactivity.

5(A) Do the provisions of Article of War 53 as amended constitute a "remedy" within the meaning of the exhaustion of remedies theory?

(B) Is compliance with the provisions of Article of War 53 as amended, an indispensable pre-requisite and mandatory condition precedent to the filing of a petition for a Writ of Habeas Corpus in the Federal Courts?

6. Is Article of War 53, as amended (effective February 1, 1949) applicable to the petitioner's case (filed April 28, 1948) in view of the fact that the petitioner had exhausted all available remedies as of the time petition for Writ of Habeas Corpus was filed in the District Court?

7. Did the failure of the Warden to seasonably raise the issue of Article of War 53 in the lower court constitute a waiver of said issue?

REASONS RELIED UPON FOR THE ALLOWANCE OF WRIT OF CERTIORARI.

The reasons relied upon for allowance of the Writ prayed for are:

1. The case raises an important question concerning the constitutionality of a statute which has not ever been, but should be, ruled upon by this Court.

2. The case raises an important question of construction of a statute which has not ever been, but should be, ruled upon and settled by this Court.

3. There is a divergence of views expressed between different Circuit Courts of Appeals concerning the construction of the finality provision of Article of War 53, as amended, as well as the constitutionality of said statute.

4. The decision of the Court of Appeals is in conflict with the decisions of this Court relating to the exhaustion of administrative remedies.

5. The Court of Appeals below has departed from the accepted and usual course of judicial proceedings in considering matters not raised in the trial court by pleadings, evidence, motion for verdict, motion for new trial, or upon appeal.

6. It is a matter of great general importance and effect to thousands of boys and men who were convicted by Court-Martial Boards during World War II.

CONCLUSION.

Wherefore, the Writ of Certiorari should issue in this cause.

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BRIEF IN SUPPORT OF WRIT OF CERTIORARI.

The opinion of the District Court and the Court of Appeals below are reported respectively in pages 17 to 23 and pages 575 to 581 of the Record; and the grounds on which jurisdiction of this Court is invoked and the statement of the case appear on pages 2 to 6 of the foregoing petition.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court, Judge Mell G. Underwood, is set forth at length on pages 17 to 23 of the Record. The opinion was rendered after a full trial and upon briefs and oral arguments of both parties. The opinion included 26 well considered findings of fact and five conclusions of law.

The District Court essentially found that the petitioner had sustained his burden, by a preponderance of the evidence, to the effect that petitioner had been denied due process of law by the General Court-Martial Board; and that such denial of due process deprived the Court-Martial

Board of jurisdiction to try and sentence petitioner; and thus such conviction and sentence were void. The District Court found:

> "1. This Court has jurisdiction of the parties and the subject matter of this action.
>
> 2. The Court-Martial Court did not have jurisdiction to try the petitioner because no thorough and impartial pre-trial investigation was conducted in compliance with Article of War 70.
>
> 3. The Court-Martial Court did not have jurisdiction to sentence the petitioner because the Trial Judge Advocate failed to call all material witnesses, which was an act inconsistent with a genuine desire to have the whole truth revealed and, therefore, prohibited by the Manual for Courts-Martial, United States Army.
>
> 4. The Court-Martial Court did not have the jurisdiction to sentence the petitioner because he was denied the effective assistance of counsel.
>
> 5. Petitioner has been deprived of his liberty without due process of law and should, therefore, be released from the custody of the respondent."

In support of the above findings, the District Court made twenty-six findings of fact. This decision was rendered on *March 31, 1949.*

At no time during the proceedings, either by the pleadings or by the evidence tendered in the Trial Court, was the issue of Article of War 53 as amended (10 U. S. C. 1525) raised, argued, or even commented upon. More notably, the Warden did not raise said issue (if it be an "issue") by filing a Motion for New Trial. This, despite the fact that Article 53 as amended had been in effect from February 1, 1949.

In the Warden's appeal and brief to the Sixth Circuit Court, no mention was made of Article of War 53 as being relied upon as one of the "Statement of Questions Involved." The Court of Appeals did not consider any of the merits of the case, nor discuss any of the rulings made by the District Court, as set forth above.

The Court of Appeals below held that despite the fact that the petitioner had exhausted all remedies available to him at the time he filed his petition in the District Court below (April 28, 1948) that Article of War 53 (effective date February 1, 1949), was a "remedy" which was available to the petitioner; and that the Writ of Habeas Corpus was "*immaturely filed,*" and "improvidently granted." The Court of Appeals below held that Article of War 53 was retroactive in effect; that the Executive Order No. 10020, of the President of the United States, did not prohibit retroactive effect being given said Article; that the law to be applied is the law in force when a decision is made, and not the law as it existed at the time of trial and judgment; and that therefore Article of War 53 as amended was applicable even though not raised in the Court below.

The Court of Appeals further held that (while declining to rule upon the constitutionality of said provision) Article of War 53 does not mean that which it *literally states* concerning finality of action by the Judge Advocate General. The Court held that "exhaustion of remedies, while not precisely jurisdictional to the consideration of a petition for Habeas Corpus, nevertheless involves a concept of broad judicial policy stemming from the concern of Federal Courts to preserve the delicate balance of authority between the state and federal judiciary, between courts and administrative agencies, and between civil and military courts. So viewing it, we think Reviewing Courts are required to apply the doctrine of exhaustion of remedies whether an issue in respect to it was raised below or not."

Accordingly, the Court of Appeals reversed the decision of the District Court, without commenting upon the merits of the case as decided by the District Court.

STATEMENT OF FACTS.

The essential facts are set forth in the petition.

SPECIFICATION OF ERRORS.

The Court of Appeals erred in reversing the decision of the District Court in the following respects:

1. In holding, in effect, that Article 53 as amended (10 U. S. C. 1525) was constitutional as "reasonably read" but declining to rule upon said provision as "literally read."

2. In holding that the effect of one subscribing to Article 53 would not amount to a "waiver" of a constitutional right.

3. In holding that Article of War 53 as amended is retroactive.

4. In disregarding the Presidential Executive Order 10020, which prohibited retroactivity.

5. In holding that Article of War 53 as amended provides a "remedy"; and constitutes an indispensable prerequisite and mandatory condition precedent to the filing of a Writ of Habeas Corpus in the Federal Courts.

6. In ruling that the petitioner had not "exhausted all other remedies" before filing his petition in the District Court.

7. In considering and ruling upon an issue (Article 53, as amended) not seasonably raised in the lower court; but to the contrary waived and abandoned by the Warden.

ARGUMENT.

1. ARTICLE OF WAR 53 AS AMENDED IS UNCONSTITUTIONAL.

(A) The "finality" clause of Article of War 53 renders the statute unconstitutional.

Article of War 53, as amended, effective February 1, 1949, is unconstitutional and in violation of Article 1, Section 9, Clause 2 of the United States Constitution, which section provides that "the privilege of the Writ of Habeas Corpus shall not be suspended except in cases of rebellion or invasion."

Article of War 53, as amended, provides:

> "Under such regulations as the President may prescribe, the Judge Advocate General is authorized upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial * * *, and provided further, that *all action by the Judge Advocate General pursuant to this article,* and all proceedings, findings and sentences on new trials under this Article * * *, *shall* be *final* and *conclusive* and orders publishing the action of the Judge Advocate General * * *, shall be *binding* upon all * * * Courts * * * of the United States."

This Article, which compels all proceedings, findings and sentences on new trials, to be final and conclusive and binding upon all Courts of the United States, makes the Judge Advocate General's Department of the U. S. Army a super-Supreme Court of the United States.

If the Judge Advocate General in his discretion overrules a motion for a new trial, then a soldier who claims constitutional deprivations in a Court Martial Conviction, is denied the privilege of the Writ of Habeas Corpus because of the compelling verbiage, "final, conclusive and * * * binding upon all Courts of the United States." If on the other hand, one attempts to file the "Great Writ" before filing a petition for new trial in the Office of the Judge Advocate General, the Court of Appeals below held such

a petition is "immaturely filed and improvidently granted." Thus, one cannot file nor be granted a Writ of Habeas Corpus (according to the Appeals Court below), *before* filing a petition for new trial with the Judge Advocate General; and one cannot file a Writ of Habeas Corpus *after* the Judge Advocate General has overruled the petition for new trial (according to Article 53 and the 5th Circuit Court of Appeals in *Whelchel v. McDonald,* 178 F. 2d 760), because of the finality provision. Thus, the Judge Advocate General usurps the powers of the judiciary, and attempts to subordinate the Federal Judiciary to the statute, the findings and decisions of the Judge Advocate General Himself.

In *Burchfield vs. Hiatt,* 86 Fed. Supp. 18, 20, District Judge E. M. Underwood made this highly interesting statement concerning the constitutionality of Article 53, as amended:

> "He further contends that the action taken by the Judge Advocate General under Article of War 53 is final and binding and may not be questioned in a Habeas Corpus proceeding, even though the Court Martial was illegally constituted and without jurisdiction. * * * To construe Article of War 53 as respondent does, would be to suspend the Writ of Habeas Corpus, which, of course is prohibited by Section 9, Article 1 of the Constitution."

There seems to be little doubt concerning the unconstitutionality of the provision that makes Administrative rulings final, conclusive and binding upon all Courts of the United States. The effect of such a provision would be an unconstitutional delegation of power by Congress, and unconstitutional usurpation of the functions of the judiciary; and would also amount to a suspension of the Writ of Habeas Corpus, in contravention of Article 1, Section 9, Clause 2 of the United States Constitution (which section provides that the privilege of the Writ of Habeas Corpus shall not be suspended except in cases of rebellion or invasion).

(B) Article 53 amounts to suspension of Writ of Habeas Corpus.

If the interpretation of Article of War 53 as contended by respondent were given effect, the net result would be that one could not file a Writ of Habeas Corpus until he has subjected himself to the review provided for in Article of War 53; and that if he did so subject himself as described in Article of War 53 he could not thereafter bring a Writ of Habeas Corpus because said determination, upon review, would be final and binding upon the Courts of the United States. This would make a dead letter of Article 1, Section 9, Clause 2 of the United States Constitution, as it would virtually be a suspension of the Writ of Habeas Corpus. The constitutionality of this provision is seriously questioned.

Several Courts have questioned the constitutionality of said provision, but have held that that provision is not an issue at this time but would be an issue if the Judge Advocate General did not grant relief under Article of War 53. *Whelchel v. McDonald,* 176 F. 2d 260; *McMahan v. Hunter,* 179 F. 2d 661; *Simmons v. Hunter,* 179 F. 2d 664. In view of the fact that one must submit to the provisions concerning finality of the judgment of the Judge Advocate General, upon review, it is in effect requiring the petitioner to subscribe to a clearly unconstitutional provision.

Yet in the case of *Whelchel vs. McDonald,* 178 F. 2d 760, 5th CCA; Dec. 26, 1949, the only reported case in which petitioner availed himself of Article 53, as amended, the Court said:

> "* * * application has been made to the Judge Advocate General for relief and has been denied, and he now seeks to add a new ground of attack upon the judgment of conviction, which was not presented in the District Court. This we think cannot be done. *Moreover, the last words of the amended Article of War 53 seems to make the action of the Judge Advocate Gen-*

eral refusing a new trial binding upon the Courts of the United States.'' (Motion denied.) (Emphasis added.)

This last pronouncement is clear and concise, yet startling and amazing. It is clear and concise that an aggrieved soldier may be denied a petition for a new trial by the Judge Advocate General of the United States Army and it is startling and amazing that this same aggrieved soldier who fought for his country all over the world is denied that sacred constitutional right of the Writ of Habeas Corpus therefor. Surely, the framers of our constitution did not envision a situation of this kind. The enormity of such a denial is a crushing blow to the ideals of liberty loving Americans. In the case of *Crowell vs. Benson,* 285 U. S., 22 (1931) it was held:

> ''It is the question whether the Congress may substitute for Constitutional Courts, in which the Judicial power of the United States is vested, an Administrative Agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, whatever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.''

In *Ex Parte Milligan,* 71 U. S. 2, 4 Wall, 218 L. Ed. 281, it was held:

> ''Our fathers knew—the history of the world told them—the nation they were founding, be its existence

short or long, would be involved in war, * * * and that unlimited power, wherever lodged at such a time, was especially hazardous to free men."

The Court held that neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution; except so far as the right is given to suspend in certain cases the privilege of the Writ of Habeas Corpus.

In *Ex Parte Billings*, 46 Fed. Supp. 663, it was held:

"The history of the Writ of Habeas Corpus is lost in antiquity. But it was in use before the Magna Charta and exists today as part of the fundamental law of the land. It is a Writ which cannot be abrogated or its efficiency curtailed by legislative action. Its position is made secure by the provision of Article 1, Section 9 of the Constitution."

"Judge Murrah of the Tenth Circuit Court of Appeals has said: 'The Writ of Habeas Corpus is a shield that guards and protects the constitutional liberties of the American citizen. Through it we inquire to see whether fundamental rights have been violated. Its function or use should not be construed or employed so narrowly as to defeat the salutary purpose it serves in our system of government.' All matters or proceedings seeking to restrain one of his liberty should be strictly construed against the government and in favor of the citizen.' *Lunsford vs. Hudspeth*, 126 Fed. 2d 653, 659.

"Habeas Corpus in character is that of a civil proceedings. It seeks the enforcement of civil rights. Resort to the Writ is had not to inquire into the criminal act of which complaint is made, but into the right of liberty, notwithstanding the act, and the immediate purpose to be served is relief from illegal restraint.

"The ultimate inquiry is the jurisdiction of the holding authority (here, the Army). *Collins vs. Johnson*, 237 U. S. 502; *Frank vs. Margum*, 237 U. S. 309.

"We think that the essential independents of the exercise of the Judicial power of the United States in the enforcement of constitutional rights requires that

the Federal Court should determine such an issue upon its own record and the facts elicited before it."

There appears to be a grave and serious conflict of opinions between some of the Appeal Courts, and between some of the District Courts that have considered the constitutionality of the "finality provision" of Article 53 as amended. To summarize, we find that in the case of *Burchfield vs. Hiatt,* 86 Fed. Supp. 18, Judge Underwood held that said finality provision rendered Article 53 clearly unconstitutional in that it amounted to a suspension of the Writ of Habeas Corpus. Thereafter, the Fifth Circuit Court of Appeals in the case of *Whelchel vs. McDonald,* 176 Fed. 2d 263, held that the petitioner was required to file for petition for new trial under Article 53 before filing his petition in the Federal District Court, holding that "the action taken on such application is expressly made binding on all courts of the United States, and that this remedy is much better adapted to reach justice than any within the power of the District Court on Habeas Corpus."

At the time the Fifth Circuit considered Article of War 53, the Court refused to rule on the constitutionality of the "finality provision" holding that it was moot at present and that it would be time enough to rule on said clause when it appeared before the court. Thereafter, the Fifth Circuit granted a stay of execution of its reversal pending the petitioner's filing under Article 53 with the Judge Advocate General. The Judge Advocate General failed to accord the petitioner relief, whereupon the petitioner in *Whelchel vs. McDonald,* 178 Fed. 2d 760, filed a motion for a rehearing. In overruling the motion for rehearing (after "remedy" under Article 53 had been exhausted) the Fifth Circuit held that "* * * *the last words of the amended Article of War 53 seems to make the action of the Judge Advocate General refusing a new trial binding upon the courts of the United States.*"

The Tenth Circuit Court of Appeals in the case of *McMahan vs. Hunter, Warden,* 179 Fed. 2d 661, held that

it was not necessary to the disposal of the appeal to pass upon the constitutionality of Article 53, and held that "we express no opinion thereon. There will be time enough to meet and answer that question when it is necessarily involved in an appeal before the Court."

The Sixth Circuit Court of Appeals in the *instant case*, held that it was necessary to rule on "one aspect of that question (constitutionality) now, for it would seem unsound to relegate the appellee to an application for review under Article 53 at the hazard of surrendering important constitutional rights if such hazard exists." This Court held the finality provision means the "decision upon the merits is final and does not go to those contentions which attack decision collaterally." This is exactly contrary to the holding (cited above) of the Fifth Circuit Court of Appeals in *Whelchel v. McDonald*, 178 F. 2d 760.

The Sixth Circuit Court of Appeals held that as "reasonably read" Article 53 is constitutional; but as "literally read, we need not decide."

Thus, it may be readily seen that the Federal Courts are floundering about in their interpretations of Article 53, each adopting a view that seems feasible to them. Each court seems to have given its own unique interpretation and construction, and no uniformity exists between said decisions between the courts.

Bearing in mind that Article 53 has direct bearing and effect upon thousands of soldiers convicted by Court-Martials during World War II, this section is of paramount importance. With the lives of several thousand men affected by Article 53, it becomes incumbent upon this Court to give a clear, concise and unambiguous interpretation of Article 53, as well as determining the constitutionality of this section. For that reason, Certiorari should be granted.

2. A VOLUNTARY SUBMISSION TO THE PROCEDURES OF ARTICLE 53 WOULD AMOUNT TO A WAIVER OF PETITIONER'S CONSTITUTIONAL RIGHTS.

Article of War 53 specifically provides that the Judge Advocate General "is authorized *upon application* of an accused person and *upon good cause shown, in his discretion* to grant * * *." There is no other language which provides that an accused *must* file a petition for a new trial; nor is there any language in the Act which makes it mandatory upon the Judge Advocate General *to hear* an application for new trial; nor is there anything in the language of Article of War 53 which makes it mandatory upon the Judge Advocate General to grant a new trial or any other relief prescribed under Article of War 53.

There is nothing *mandatory* in Article of War 53 that requires that a petition for new trial be filed, nor is there anything in the Article of War 53 which sets it as a prerequisite to the filing of a Writ of Habeas Corpus in a Federal Court; especially when the petition alleges that the conviction and sentence is void. Examining the language of this section further it should be noted that "* * * upon application of an accused person, and upon good cause shown, in his (Judge Advocate General's) discretion to grant a new trial, or to vacate a sentence * * *." The section contains certain provisos which also attach to the filing of a petition for new trial under this section. That is, in order for one to file a petition for new trial he must (a) do so "within one year after termination of the war"; (b) make "only one such application"; and (c) "must submit and agree that the Judge Advocate General's ruling thereon shall be final and conclusive and * * * shall be binding upon all * * * Courts * * * of the United States." It should be noted that (a), (b) and (c) above are all prefaced with the word "provided," or "provided further";—thus making (a), (b) and (c) above, conditions to the petition for new trial.

There seems to be little doubt concerning the unconstitutionality of the provision that makes administrative rulings final, conclusive and binding upon all courts of the United States. The effect of such a provision would be an unconstitutional delegation of power by Congress, and unconstitutional usurpation of the functions of the judiciary; and would also amount to a suspension of the Writ of Habeas Corpus, in contravention of Article I, Section 9, Clause 2 of the United States Constitution (which section provides that the privilege of the Writ of Habeas Corpus shall not be suspended except in cases of rebellion or invasion).

If the interpretation of Article of War 53 as given by the Appeals Court below were given effect, the net result would be that one could not file a Writ of Habeas Corpus until he has subjected himself to the review provided for in Article of War 53; and that if he did so subject himself as described in Article of War 53 he could not thereafter bring a Writ of Habeas Corpus because said determination, upon review, would be binding upon the Courts of the United States. This would make a dead letter of Article I, Section 9, Clause 2 of the United States Constitution, as it would be a suspension of the Writ of Habeas Corpus.

Several Courts have questioned the constitutionality of said provision, but have held that that provision is not an issue at this time but would be an issue if the Judge Advocate General did not grant relief under Article of War 53. In view of the fact that one must submit to the provisions concerning finality of the judgment of the Judge Advocate General, upon review, it is in effect requiring the petitioner to subscribe to a clearly unconstitutional provision. It is clear that no one is required to ascribe or comply with a Statute that is unconstitutional. For these additional reasons, this Court should reject the Appeals Court's theory that petitioner has not exhausted all his remedies and is *required* to file a petition for new trial. It

should be noted under Articles of War 48, 49 and 50, as amended by the 1949 Manual for Courts Martial, the Judge Advocate General is *required* to review "all cases involving sentences not requiring approval or confirmation by the President." There is absolutely *nothing*, in Articles of War 48, 49, 50 and 51, as amended in 1949 Manual for Courts Martial, which *requires* one to file a *petition for new trial.* Article of War 53, herein discussed, makes it *discretionary* on the part of the convicted person as to whether he chooses to file a petition for new trial. In other words, he *may* submit to the provisions of Article of War 53 (albeit unconstitutional) and file a petition for new trial or he may avail himself of his constitutional rights to file a Writ of Habeas Corpus and set forth therein that his conviction and sentence were null and void because (a) a Court-Martial Board was not legally constituted and (b) because he was denied due process of law which in turn deprived the Court-Martial Board of jurisdiction. No Administrative Agency, the Judge Advocate General's Office included, can breathe life into a void order.

As between two alternatives available to the petitioner, one to proceed under an unconstitutional provision, and another to proceed by availing himself of his constitutional right of filing his Habeas Corpus. It certainly cannot be held that the petitioner must pursue an alleged remedy under an unconstitutional provision. The constitutionality of that section becomes immediately at issue because Gusik must submit himself to the entire provision thereof. It is submitted, that if the petitioner would submit himself to the provision of Article of War 53 he would be subjecting himself to the "finality" provision thereof;—even though said section is clearly unconstitutional; and he would be waiving the unconstitutionality of said section of Article of War 53 by voluntarily following the discretionary procedure of Article 53.

The Appeals Court below agreed that:

"* * * it would seem unsound to relegate the appellee to an application for review under Article 53 at the hazard of surrendering important constitutional rights if such hazard exists."

The Court then, however, offered their interpretation of Article 53 and concluded that the finality provision of Article 53 should not be literally read and that:

"* * * all that is meant by the finality provision in Article 53 is that decision upon the merits is final and does not go to those contentions which attack decision collaterally."

This interpretation of Article 53 however is in direct conflict with the holding of the Fifth Circuit Court of Appeals in the case of *Whelchel v. McDonald*, 178 F. 2d 760 wherein that Court held (after relief pursuant to Article 53 was denied by the Judge Advocate General) that:

"Moreover, the last words of the amended Article of War 53 seems to make the action of the Judge Advocate General refusing a new trial binding upon the Courts of the United States."

The petitioner is in a position of not knowing where he stands in relationship to his constitutional rights under the above interpretations. For this reason certiorari should be granted.

3. ARTICLE OF WAR 53, AS AMENDED, IS NOT RETROACTIVE.

(A) To be retroactive, the statute must be clear and unequivocal and allow of no other interpretation.

It is the contention of petitioner that error was made by the Court of Appeals below in stating that the petitioner must resort to Article of War 53, as amended, since said article was in effect at the time that the *order of release was made*, although said article was not in effect at the time the within cause was filed, docketed, heard and submitted.

Such a ruling is repugnant to the basic principle against retroactivity and retrospectivity. As is seen in the citation of the following cases, our courts have, from the earliest dates to the present time, affirmed and reaffirmed the rule that laws are not to be considered retrospectively unless the legislation makes such consideration absolutely necessary, by the words of the act.

In as early a year as 1806, the Supreme Court of the United States set forth this principle in a case which is cited as authority for the rule, from the year 1806 to the present time. In that case, *The United States v. Heth*, 3 Cranch 398, this Court said:

> "Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied. This rule ought especially be adhered to when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services, and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

It is evident by the citation of the basic principle as set forth in the above case, that statutes are not to be given retrospective construction unless they are explicitly retroactive within themselves and can be subject to no other interpretation.

Throughout the history of our great nation, the right to the writ of habeas corpus has been zealously guarded. As Chief Justice Marshall stated in 1829 in the case of *John Reynolds, Tenant the United States; Plaintiff v. Duncan M'Arthur, Defendant*, 2 Peters 417, 27 U. S. 417:

> "It is a principle which has always been held sacred in the United States, that laws by which human action are to be regulated, look forward, not backward; and

are never to be construed retrospectively unless the language of the act shall render such construction indispensable."

Certainly the case at hand is one in which human action is regulated. It is a case that clearly calls for *prospective* consideration, and *not* retrospective consideration. There is nothing in the language of the act which renders a retroactive or retrospective consideration in the least necessary, let alone indispensable. It follows therefore that retrospective construction and retroactive application of Article of War 53, as amended, endangers the right to the writ of habeas corpus. Said article is not one that can properly be construed retrospectively.

In the well known and oft cited, *20% Cases*, XX Wallace 179, 87 U. S. 179, this Court re-affirmed in positive terms the rule against retrospective interpretation of statutes, unless the language of the statute explicitly expresses the intention that it is to be applied retroactively.

This Court in 1860 affirmed the principle and rule against retrospectivity, in the case of *William S. McEwen and Henry H. Wiley, Plaintiffs in Error v. John Den, Lessee of Charles Bulkley and Stuart Brown*, 24 Howard 242, 65 U. S. 242. In this case, the court said:

"We think that the Statute of 1856 is prospective, and that to hold otherwise would be a strained construction, and violate a general rule of jurisprudence, to wit, that *it is of the very essence of a new law that it shall apply to future cases, and such must be its construction, unless the contrary clearly appears.*" (Emphasis added.)

This Court in the case of *Hamilton, Murray Use, etc. v. John A. Gibson*, 15 Howard 423, 56 U. S. 423, reiterated the rule against retrospective operation of statutes. Mr. Justice Daniels speaking for the court stated:

"As a general rule for the interpretation of statutes, it may be laid down that they should never be allowed

a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only."

In commenting upon this rule as it affects the rights of parties, the court said:

"Especially should this rule of interpretation prevail, where the effect and operation of a law are designed, apart from the intrinsic merits of the rights of parties to restrict the assertion of those rights."

The principle which so clearly affects the rights of petitioner should certainly be applied in the instant case. At the time that application for writ of habeas corpus was made in April, 1948, Article of War 53, as amended, was not in effect. Petitioner submits, that since said article is neither retroactive by direct language nor by retrospective construction, the order of release was properly made. As regards construction, what is not there specifically should not be construed by implication, unless such be indispensable to the act itself.

In 1940, in the case of *Haggar Company v. Helvering, Commissioner of Internal Revenue*, 308 U. S. 389, this Court said:

"Retrospective declaration of legislative intent, prejudicial to those who have acted under an earlier statute whose construction seems clear, it would seem, ought not to be implied more than the legislative intention to give retroactive operation to a new statute."

In the case of *Harvey v. Tyler*, II Wallace 328, 69 U. S. 328, the rule against considering statutes retrospectively, was affirmed by this Court, the court saying,

"* * * it is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."

In *Schwab, Executor of Dickel v. Doyle, United States, Collector of Internal Revenue for the Fourth Collection District of Michigan*, 258 U. S. 529, Mr. Justice Butler, speaking for the court, asked:

"If retroactivity be accepted what shall mark its limit?"

Referring to retrospectivity, the court stated:

"* * * a statute should not be given a retrospective operation unless its words make that imperative."

Further reference to retrospectivity is found when the court says:

"* * * *laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared.*"

Quoting *Story on Constitutional Law*, Sec. 1398, the court says:

"Retrospective laws are indeed generally unjust; and has been forcibly said, neither accord with sound legislation nor with the fundamental rule of the social compact."

Again referring to the validity of retroactive and retrospective laws, the court says:

"There is absolute prohibition against them when their purpose is punitive; they then being denominated *ex post facto* laws. *It is the sense of the situation that that which impels prohibition in such case, exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated.*

"The Act of September 8, 1916, is within the condemnation.

"There is certainly in it no declaration of retroactivity, clear, strong, and imperative which is the condition expressed in United States v. Heth, 3 Cranch

398, 413 2 L. ed. 479, 483 also United States v. Burr, 159 U. S. 78, 82, 83, 40 L. ed. 82, 15 Sup. Ct. Rep. 1002.

"If the absence of such determining declaration leaves to the statute a double sense, it is the command of the case that that which rejects retroactive operation must be selected."

In 1938, Mr. Justice Roberts, in the case of *Hassett, Former Acting Collector, v. Welch, et al., Executors,* 303 U. S. 303, said:

"In view of other settled rules of statutory construction, which teach that a law is presumed in the absence of clear expression to the contrary, to operate prospectively, that if doubt exists as to the construction of a taxing statute, that doubt should be resolved in favor of the taxpayer." (303 U S. 303.)

Certainly, since doubt is resolved in favor of the taxpayer as regards *property* rights, then in accordance with all that is fair and just, and in accordance with the rule as stated by Chief Justice Marshall in the case of *Reynolds v. McArthur,* 2 Peters 417, 27 U. S. 417,[1] the statute in question should not be considered retrospectively, for if property rights are so protected, then certainly human rights should be accorded at least equal treatment.

Mr. Justice Harlan, in *Chew Heong v. The United States,* 112 U. S. 536, speaking for the court says:

"Courts uniformly refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature."

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[1] "It is a principle which has always been held sacred in the United States, that laws by which human action are to be regulated, look forwards, not backwards; and are never to be construed retrospectively unless the language of the act shall render such construction indispensable."

Then, after citing the above rule, as set forth in the case of *The United States v. Heth*, 3 Cranch 398, 413, the court goes on to say:

> "So far from the Court being compelled by the language of the Act of Congress, to give it a retrospective operation, the plain, natural and obvious meaning of the words, interpreted with reference of the general scope and the declared purpose of the statute, utterly forbids the conclusion that there was any intention to impair or destroy rights previously granted."

In *Brewster v. Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457, the court stated:

> "Ordinarily, statutes establish rules for the future, and they will not be applied retroactively unless that purpose plainly appears." (280 U. S. 327.)

In the case of *Davis, et al. v. Rockton & Rion Railway*, 65 F. S. 67, decided in March, 1946, the court speaking of the growth of the rule against retrospective construction, states:

> "Furthermore, it is now well established by the Supreme Court in a consistent line of cases from its earliest days to the present time that statutes will be construed as operating prospectively, unless an intention that they shall have retrospective effect is clearly expressed, and that they will not be given retroactive effect or construction to change the status of pending claims unless the legislative purpose so to do plainly appears."

On appeal, the above case was heard and judgment affirmed, in *Rockton & Rion Ry. v. Davis, et al.*, 159 F. 2d 291, the court held:

> "It is a familiar rule of law, that retroactive legislation is not favored and that statutes are to be construed as operating not retroactively but only prospectively, unless a contrary intention is manifest in either the language of the statute or the clear and unmistakable purport of the legislature."

Petitioner respectfully submits that Article of War 53 as amended, is not a retroactive statute either by direct language or by construction. It follows, therefore, that in accordance with the law, as herein set forth, that it is not subject to retrospective interpretation.

(B) Retrospective interpretation of Article of War 53, as amended, would be punitive as to petitioner and fall within prohibition of ex post facto laws.

The Court of Appeals below stated that Article of War 53, as amended, is remedial and not punitive. Assuming (but not conceding) that it is remedial, the retroactive application by retrospective construction of the statute as against petitioner would be punitive. It would wrongfully take away his right to the writ of habeas corpus for which petitioner had already applied. The Appeals Court below erred in its judgment, because, since the application for the writ was made before the enactment of the article, then denial of the writ by retrospective construction of the article would make it punitive as to petitioner, for it would deny him the right to a writ for which he had already applied. Such retrospective interpretation would make him relinquish the writ of habeas corpus, *taking away from him a vested right, contrary to the Constitution of the United States.* It would deny to him a basic and sacred right, in which every citizen of our nation places extreme faith and believes inviolate.

To deny to petitioner the right to this great writ for which he had already applied, is not only repugnant to the rule against retrospective construction of statutes, but it is also repugnant to Article I, Section 9, Clause 2, of the Constitution of the United States *which allows suspension of the writ only in times of rebellion or invasion, and only then, when public safety requires such suspension.*

(C) There was no congressional intent to make Article 53 retroactive.

Article of War 53, as amended, can not be applied retroactively against the petitioner, unless the act specifically calls for retroactive application or unless it is clear from the act itself that Congress intended that it be applied retroactively. Since there is nothing in the language of the act itself that compels retroactive interpretation, then the only manner in which the existence of a contrary intention can be determined is by examining the intentions and purposes of Congress, as reflected in the committee hearing reports. An exhaustive examination of the Congressional Record of the "Committee on Armed Services Hearing," House 1, Pt. 2, 80th Congress, Hearing No. 125, wherein Article of War 53, as amended, was discussed reveals that *nowhere* in the entire Congressional committee hearings is there any comment whatsoever concerning *retroactivity of Article of War 53,* as amended, or any other of the Articles of War as amended. This despite the fact that the Judge Advocate General and the Assistant Judge Advocate General both testified before the Armed Services Committee. In view of the failure to mention retroactivity of said statute by the Congressional committee, or the Judge Advocate General, petitioner contends that Article of War 53, as amended, was not intended to be retroactive. Further, since there is nothing in the language of said article that compels retroactivity, it follows that the article must be construed prospectively.

4. THE EXECUTIVE ORDER OF THE PRESIDENT OF THE UNITED STATES PROHIBITS RETROACTIVITY OF ARTICLE 53.

The Appeals Court below erroneously held that Article of War 53 is retroactive in its application, though the effective date of said Article is February 1, 1949, and despite the Executive Order (Preface page IX) of the Manual for

Courts-Martial, U. S. Army, 1949, wherein said Order (which puts into effect said Articles of War) provides that the Articles therein shall *not* be retroactive or apply to *actions commenced prior to* February 1, 1949. We respectfully refer the court to the said Executive Order 10020, by the President of the United States, Harry S. Truman, wherein it is provided:

> "This manual which shall be in force and effect in the Army of the United States *on and after* February 1, 1949, *with respect to all court-martial processes taken on or after February 1, 1949:* Provided, that *nothing contained in this manual shall be construed* to invalidate any investigation, trial in which arraignment has been had, or other *action begun prior to February 1, 1949;* and *any such* investigation, trial, or *action so begun may be completed in accordance with the provisions of the Manual for Courts-Martial 1928:* Provided, further, that nothing contained in this manual shall be construed to make punishable any act done or omitted prior to the effective date of this manual which was not punishable when done or omitted: And provided further, that the maximum punishment for an offense committed prior to February 1, 1949, shall not exceed the applicable limit in effect at the time of the commission of such offense." (Emphasis added.)

It is further provided in the *Manual for Courts-Martial,* 1949, page 1 that:

> "The sources of military jurisdiction include the Constitution and International Law. The specific provisions of the Constitution relating to military jurisdiction are found in the powers granted to Congress, *in the authority vested in the President* and in a provision of the Fifth Amendment."

Thus, it becomes apparent that the President has the power, under the Constitution, not only to prescribe the order which puts in effect the amendments as passed by Congress, but also to set forth the effective date thereof. Further, the President's authority is set forth in the first

paragraph of said Executive Order pursuant to the authority vested in the President by the Act of Congress which amended said Articles of War. Paragraph 1 of said Executive Order provides:

> "By virtue of the authority vested in me by Chapter II of the Act of Congress entitled "An Act to Amend an Act Entitled 'An Act for making further and more effectual provision for the national defense and for other purposes,' approved June 3, 1916, and to establish military justice," approved June 4, 1920 (41 Stat. 787), as amended by Title II of the Act entitled "An act to provide for the common defense by increasing the strength of the armed forces of the United States, including the reserve components thereof, and for other purposes," approved June 24, 1948 (62 Stat. 627) and as President of the United States, I hereby prescribe the following Manual for Courts-Martial to be designated as "Manual for Courts-Martial, U. S. Army 1949."

The second paragraph of the Executive Order specifically provides *directions to the contrary* so far as applying retrospectively to the 1949 Manual for Courts Martial. The Executive Order, which is a part and parcel of the Manual for Courts Martial, 1949, provides that nothing contained in the Manual "shall be construed to invalidate any investigation, trial in which arraignment has been had, *or other action begun prior to February 1, 1949;* and any such investigation, trial *or action so begun may be completed in accordance with the provisions of the Manual for Courts Martial, 1928:* * * *" In view of the unequivocal expression contained in the new manual, the contention of the Appeals Court below that Article 53 is retrospective, must fail.

The manual (President's Executive Order) makes a prohibition against either the substantive or the procedural sections of the New Manual being retrospective, and the court errored in rejecting the provisions of the President's Executive Order.

5. ARTICLE OF WAR 53 IS NOT AN INDISPENSABLE PREREQUISITE TO THE EXHAUSTION OF REMEDIES THEORY: NOR IS THE PETITION FOR A NEW TRIAL (THEREUNDER) A MANDATORY CONDITION PRECEDENT TO THE FILING OF A WRIT OF HABEAS CORPUS.

(A) Petition for new trial, pursuant to Article 53, is not a "remedy."

In the very recent and leading case of *Levers, Adm. v. Anderson,* 326 U. S. 219, 222 (1945), this Court ruled on an almost identical situation as involved here. In the *Levers* case an alcohol tax question had been adjudicated by the alcohol tax unit, all administrative procedure of appeal having been exhausted. The Act provided that a motion for re-consideration could be filed with the Administrator, and the administrator was given discretionary powers under said Act to change or modify his original order. The Administrator did, however, make a final ruling on the merits of the case. Suit having been brought in the Federal Court, the Government contended that said suit was prematurely filed in that the plaintiff had not "exhausted his administrative remedies," by filing the permissive "motion for new trial." This Court rejected such theory and held that:

> "the 'long settled rule of judicial administration (is) that no one is entitled to judicial relief until the prescribed administrative remedy has been exhausted.' *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50, 51. But this rule does not automatically require that judicial review must always be denied where rehearing is authorized but not sought. This is shown by our past decisions * * * from which we see no reason to depart. * * *"
>
> "The orders here challenged were entered after a hearing and they were of a definite character dealing with the merits of a proceeding." (page 223.)
>
> "The regulations only provide that the supervisor 'may hear the application for a rehearing.' No other lan-

guage of the regulations, and no satisfactory proof of publicly established practice under them, persuades us that the 'may' means must, or that the supervisors were required to hear oral argument."

"* * * there is no assurance that a rehearing will be granted * * *. Consequently, whatever weight such factors might be accorded in determining administrative finality of the orders is absent here." (p. 224.)

"Our conclusion is that the motion is in its effect so much like the normal formal type of motion for rehearing that we cannot read into the Act an intention to make it a prerequisite to the judicial review specifically provided by Congress." (p. 224.)

The Court of Appeals below, in disregard of the above cited decision, erroneously held that the petition for new trial (Article 53) was a "remedy"; and that inasmuch as the petitioner had not filed an application for new trial under Article 53, "the Writ of Habeas Corpus was immaturely filed and improvidently granted." This decision of the Court of Appeals is directly contrary to the settled rule as expressed by this Court in 1945 in the *Levers* case above.

While the Manual for Court-Martial does not specifically provide for judicial *review* of Court Martial convictions, the right of an accused to file a Writ of Habeas Corpus based upon illegal conviction and sentence and detention is undisputed. That right is guaranteed by Article 1, Section 9, Clause 2 ("the privilege of the right of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it"). It is not possible to read into Article of War 53 an intent to make said Article an indispensable prerequisite to the filing of a Writ of Habeas Corpus, guaranteed by the Constitution.

The *Levers v. Anderson* decision (326 U. S. 219) by the Supreme Court (1945) is in conformity with the long line of decisions of this Court to the effect that an application to an administrator (or administrative body) for a rehear-

ing is not a necessary preliminary to the bringing of a suit in the Courts.

Hollis v. Kutz, 255 U. S. 452;
B. & O. R.R. Co. v. Railroad Comm., 196 Fed. 690;
Re Arkansas Rate Cases, 187 Fed. 290;
Atchison T. & S. F. R. Co. v. Love, 174 Fed. 59;
Atlantic Coast Line R. Co. v. Interstate Comm. Com., 194 Fed. 449;
Chicago R. Co. v. Ill. Comm. Com., 277 Fed. 970.

There is absolutely nothing in the language of Article 53 that compels the interpretation that it was a congressional intent to make the filing of a petition for new trial, pursuant to Article 53, as amended, an indispensable pre-requisite to the filing of a Writ of Habeas Corpus.

An examination of the congressional record of the "Committee on Armed Services hearings," House I Pt. II, 80th Congress, hearing number 125, wherein Article of War 53 was discussed, reveals that *there is absolutely no comment whatsoever* concerning the procedures of Article 53 being a *pre-requisite* to the filing of a Writ of Habeas Corpus.

In the case of *Prendergast vs. N. Y. Telephone Co.*, 262 U. S. 43, this Court emphatically reiterated the rule that the filing of a petition for reconsideration before the same officer, board, commission or tribunal that had finally passed upon a matter is not and should not be an indispensable step in exhausting the administrative remedy.

The ordinary petition for re-hearing is not and should not be a pre-requisite to judicial review of an administrative order.

Prendergast v. N. Y. Teleph. Co., 262 U. S. 43;
U. S. v. Abilene I. S. R. Co., 265 U. S. 274;
Banton v. Belt Line R. Corp., 268 U. S. 413;
cf: *Vandalia R. Co. v. Public Serv. Comm.*, 242 U. S. 255;

B. & O. R. Co. v. Railroad Comm., 196 F. 690 (cc);
Chicago R. Co. v. Illinois Comm. Comm., 277 F. 970 (dc);
Canadian River Gas v. Terrell (DC) 4 F. Supp. 222.

By the same token, the provision for the filing of a petition for new trial is in its effect like the usual normal formal type of motion for re-hearing. In processing an appeal from a lower court to a higher court can it be contended that the motion for re-hearing must be filed by an appellant before he can process an appeal? Obviously, motions for re-hearing and reconsideration are permissive in character and not mandatory requirements to the orderly administration of appellant precedures. In that regard it should be noted that the Petition for a New Trial (Article 53, as amended) is not an absolute "right" that the petitioner may employ. Such a petition can only be granted "in the discretion of the Judge Advocate General." Further, the Article provides that application by the accused "may" be made. It is *not* a mandatory procedure. Article 53 confers no more than the *authority* upon the Judge Advocate General to grant the relief of that section *if* an accused chooses to subject himself to the discretion of the Judge Advocate General. It does not create a "remedy."

In the case of *Hollis v. Kutz*, 255 U. S. 452, 192, this Court passed upon a similar situation and held:

> "We do not perceive any advantage in requiring a party to file a complaint asking the commission to review a decision just reached by it after a public hearing, nor do we see such a requirement in the statute. * * * and when they (plaintiffs) stand upon supposed constitutional rights there seems to be no necessity of raising the point until they get into Court."

In the case of *B. & O. R. R. v. Railroad Comm.*, 196 Fed. 690, 693, the Court discussed that section of the Act which conferred authority upon the Commission to grant re-

hearing and held: *"It confers an authority, instead of a remedy."* The Court specifically rejected the contention that *a permissive rehearing was a "remedy."*

(B) Law does not require futile gestures.

This Court has reiterated time and again that the exhaustion of the remedies afforded by a State before applying for a Writ of Habeas Corpus in the Federal Court was based upon the theory that the State Court should be given the opportunity to deal with a question as to (a) an invalid sentence (b) jurisdiction (c) denial of a constitutional right (denial of counsel, due process, etc.) and accord the privilege of correcting its own records and pass upon its own cases. See annotation, 88 L. Ed. 576, 595.

In the instant case the administrative agency involved, —the army,—was afforded the opportunity of correcting its own records and did pass upon the merits of this case. Its ultimate Appellate Authority, the Judge Advocate General reviewed the merits of the within case and found that the record was "legally sufficient" and that "there were no errors injuriously affecting the substantial rights" of the petitioner, and denied relief. (R. 312, 341.)

Article 53 provides that the Judge Advocate may grant relief if, in his discretion, the application shows "good cause." The Judge Advocate General has ruled in his initial review (just prior to the filing of this action in the Federal Courts) that there was not "good cause" shown. It is absurd to require the petitioner to undergo the futile and idle gestures of having the same ruling by the same person.

The law does not require one to undergo futile or idle gestures! See *Wade vs. Mayo*, 334 U. S. 672.

As Justice Frankfurter recently stated in *Darr vs. Barford*, 18 Law Week 4217, 4224 (April 3, 1950):

> "The Great Writ of liberty ought not to be treated as though we were playing a game."

In further reference to the procedural requirements concerning Habeas Corpus, Justice Frankfurter stated:

> "Surely it is necessary to consider what a procedure requirement means before making it a requirement."

By the same token, we are confronted in the instant case with the Sixth Court of Appeals adopting the construction of Article 53 advocated by the Respondent, to the effect that a permissive petition for new trial, the allowance of which is in the discretion of the Judge Advocate General, is an indispensable prerequisite and mandatory condition precedent to the filing of a Writ of Habeas Corpus in the Federal District Court. This erroneous holding should be reversed and brought into conformity with the previous rulings of this Court to the effect that a petition (or motion) for a new trial need not be filed before one brings his action in the Federal Courts.

6. ADMINISTRATIVE REMEDIES ARE EXHAUSTED WHEN THE JUDGE ADVOCATE GENERAL RULES ON THE INITIAL APPELLATE REVIEW.

The Judge Advocate General did review and pass upon the merits of the conviction and sentence of the within petitioner (R. 313). This review took place on January 26, 1948, at which time the recommendations of the Judge Advocate General's Board of Review was approved and the sentence reduced from life imprisonment to sixteen (16) years. As of January 26, 1948, there were no further remedies, within the army itself, available to the within petitioner. This review by the Judge Advocate General, and as approved by the Secretary of the Army, was more than one (1) year prior to the effective date (February 1, 1948) of Article of War, as amended. As of April 28, 1948, the date upon which the within Petitioner filed his petition for Writ of Habeas Corpus in the Federal District Court, he had exhausted every available avenue of the appellate procedure then provided by law (Articles 48, 49, 50, 50½, Manual for Courts Martial, 1928).

Having exhausted all statutory appellate proceedings provided by the law then in effect[1] the petitioner filed his Writ in the District Court claiming he had been denied due process of law, and that the Court Martial Board was without jurisdiction to try or sentence him.

The ruling by the *Judge Advocate General* was upon the merits of the case, and after an oral hearing (counsel for the petitioner being present) before the Judge Advocate General's Board of Review. At said hearing, the same contentions, in substance, were raised by the petitioner as were asserted in the Federal District Court. The Judge Advocate General's Board of Review held that the record of trial was "legally sufficient" (R. 312) and that "no errors injuriously affecting the substantial rights of the accused were committed" (R. 341). The Petitioner, still of the opinion that his constitutional rights had been violated availed himself of the only remedy not yet exhausted—the petition of Writ of Habeas Corpus. The Federal District Court, after a lengthy trial and receipt of evidence, sustained the petitioner's contentions; granted the Writ, and discharged the petitioner from illegal restraint.

7. ARTICLE OF WAR 53 WAS NOT SEASONABLY RAISED IN THE LOWER COURT BY THE RESPONDENT.

The record of trial in the District Court below is devoid of any assertion by the Warden as to the applicability of Article of War 53, as amended (10 U. S. C. 1525), in this matter. Only on January 30th, 1950, exactly one day prior to the date set for oral argument before the United States Court of Appeals, *by reply brief*, did the Warden present the claim as to the applicability of Article of War 53 (10 U. S. C. 1525), to the within petitioner.

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[1] The merits of the case were successively reviewed, approved and confirmed by each of the following: Staff Judge Advocate, Commander Port of Leghorn, Board of Review in Judge Advocate General's Office, Judge Advocate General, and Secretary of the Army. (R. 9.)

Article of War 53 was not an issue in the original application, return or traverse! On that basis Article of War 53 was not seasonably raised in the lower court and could not thereafter be asserted in the appeals court as the necessity of raising all questions except jurisdiction below is imperative.

The law is clear that one must seasonably raise an issue, except jurisdiction, in the lower court or that issue will be considered as having been waived. This doctrine was expressed in the leading case of *Helvering v. Wood*, 309 U. S. 344 (1940), wherein it was held:

> "The Board of Tax Appeals purported to place its decision solely on Sections 166 and 167 of the Act * * * Petitioner in his assignments of error specifically sanctioned only Sections 166 and 167, not Section 22(a). * * * Though petitioner in his petition for certiorari relied on Section 22(a), respondent in opposition thereto took the position that that point was not available to petitioner here as it was not raised below. In view of these facts, especially the express waiver below, we do not think that petitioner should be allowed to add here for the first time another string to his bow. * * * To open here for the first time and in face of the express disclaimer on inquiry into the broader field is not only to deprive this court of the assistance of a decision below but to permit a shift to a ground which the taxpayer had every reason to think was abandoned in the earlier stages of this litigation."

The Warden, in the instant case, used every string in its collection to circumvent the District Court's decision of freeing Thomas Gusik, the petitioner. It went to such extremes as transporting at great expense witnesses from their Italian and California areas. All the vast resources at its command were expended to the end that a Court Martial adjudication, which its highest echelons had reviewed, would prevail. Not once, however, did it raise the issue of Article of War 53 (10 U. S. C. 1525), either during the District Court hearing or thereafter by a Motion for

a New Trial. In desperation, and as a last resort, by reply brief, which was filed just one day before the Court of Appeals review, did the respondent raise the issue of Article of War 53, and by so doing add another string to its bow. This addition of an issue, according to the decision of *Helvering v. Wood*, 309 U. S. 344, was not proper as the respondent is not entitled to raise it in the Appellate Court (in purported reply) when he did not raise it in the District Court below.

The same Circuit Court of Appeals, Sixth Circuit, on April 26, 1948, in *DeWaters v. Macklin Co.*, 167 Federal 2nd 694, said:

> "Appellee urges as an additional ground, for the first time in this court, the provisions of Section 9 of the Portal-to-Portal Act of of 1947, Ch. 52, Public Law 49, May 14, 1947, 29 U. S. C. 4, #258, which provides in substance that in any action commenced prior to the date of the commencement of the enactment of the Act, no employers shall be subject to any liability to pay minimum wages or overtime compensation under the Fair Labor Standards Act if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval or interpretation, of any agency of the United States. * * * This action was filed May 24, 1945; the judgment was entered on Dec. 31, 1946, both dates being prior to the enactment of the Portal-to-Portal Act. Accordingly, the provisions of the Act were not considered by the District Court. *We recognize the rule that where there is a change in the applicable law subsequent to the judgment in the trial court and pending appeal, the reviewing court will apply the law as it is at the time of the review. * * * But the rule is not applicable where the issue has not been made in the trial court and the court's judgment does not include a ruling on the issue.*"

This *DeWaters v. Macklin Co.* decision, made by the same Circuit Court of Appeals that adjudicated the instant

case, supports the petitioner's contention. Here we have an instance of a Circuit Court of Appeals diverting from its own rulings on the same issue without overruling said decision. Only a decision of the Supreme Court of the United States could settle this conflict. The filing of the petitioner's original Writ of Habeas Corpus was made in good faith and relying on remedies having been exhausted prior to its filing. In good faith the petitioner had relied on every administrative regulation, order, ruling and request prior to his application in the Federal Court. The respondent, in reply, never questioned petitioner's position.

Only as a last resort, and in desperation, did the respondent, by Reply Brief, which was filed just one day prior to the Appellate Review, raise the issue of the applicability of Article of War 53, 10 U. S. C. 1525, which had become effective only a short time before the District Court's ruling and after all the evidence had been presented. The Warden's contention, at that late date, called for the petitioner's compliance with a then non-existent procedural step. The Appellate Court, in upholding the respondent's contention, ignored its own ruling laid down in the case of *DeWaters v. Macklin Co.* The fact that the instant case involves a human right, as distinguished from a property right, makes it all the more imperative that the Appellate Court should have followed the precedent it established in *DeWaters v. Macklin Co.*

The United States Supreme Court, in the case of *The Pennsylvania Railroad Co. v. Public Utilities,* 298 U. S. 170, reasserted the principle that *a point not made in the complaint will not be considered by the Appellate Court.* Article of War 53, 10 U. S. C. 1525, not having been made a point in the District Court hearing, cannot be made an issue in the Appellate Court. The desertion of this principle by the Appellate Court in the instant case cries for reconsideration.

In the case of *The General Utilities & Operating Co. v. Helvering*, 296 U. S. 200, *this Court censored the Circuit Court of Appeals for having considered a contention that had not been before the court below.* In the instant case, Article of War 53, 10 U. S. C. 1525, although in effect at the time of the decision of the lower court, was not raised prior to the decision of the District Court. In addition, it was not raised by the respondent in a possible Motion for a New Trial. Further, at the time of Warden's filing of the appeal to the Circuit Court of Appeals, the issue of Article of War 53 was not raised or presented. The injection of this issue into the litigation did not originate until one day prior to the date set for the oral hearing before the Circuit Court of Appeals. This Appellate consideration of an issue, which was neither presented to nor ruled upon by the lower court, represents reversible error.

It was held in the case of *Pierce v. Brown*, 7 Wall. 205, that *formal defects in proceedings not objected to in the Court of original jurisdiction cannot be assigned as an error in an appellate tribunal.* There is no record in the instant case of Article of War 53, 10 U. S. C. 1525, having been raised in the original tribunal. Contentions, which the record does not show to have been presented directly or indirectly, to the trial court, by way of pleading or otherwise, before final judgment, and which were not made the subject of complaint in the motion for a new trial—cannot be considered by the Supreme Court. See *Southern Pine Lumber v. Ward*, 208 U. S. 126.

It is too late on appeal to object, for the first time, to the particular form of the action. Marine Bank v. Fulton County Bank, 2 Wall. 252. *An objection to the form of remedy comes too late to be available in an appellate court when first made on a motion for a new trial after verdict. American Tobacco v. Werckmeister*, 207 U. S. 284. *An Appellate Court will not express any opinion upon a de-*

fense which was not brought to the attention of the court below. Bell v. Bruen, 1 How. 169.

Such questions only as are specified in the assignment of errors are, in general, to be regarded as open in the appellate court: Schalely v. Rew, 23 Wall. 331. Objections taken below and incorporated in the bill of exceptions will be considered as abandoned where they are not urged in the appellate court. *Ewing v. Howard*, 2 Wall. 499. *The appellate court will not inquire into questions not made on the peadings nor involved at the hearing. Patton v. Taylor*, 7 How. 132.

A question cannot be considered by the superior court when it was not presented to the court below, and the evidence upon the point is not contained in the record. *Washington & G. R. Co. v. Gladman*, 15 Wall. 401. The ends of justice are not promoted by allowing parties to stand by and not take exceptions, and afterwards reverse judgments for omissions, which, if noticed at the time, would have been corrected. *Townsend v. Jamison*, 7 How. 706.

The exceptional circumstances of the instant case brings to light a situation in which the respondent was made conversant with all the District Court's later findings of fact and conclusions of law. At its own initial appellate Judge Advocate review (counsel for petitioner presented brief and oral argument), petitioner raised those same issues upon which the District Court found for petitioner. The Judge Advocate's initial appellate review board chose to find itself sacrosanct and saw no denials of due process. When the District Court found in favor of the petitioner, the respondent, in desperation, looked for an escape and attempted to use the avenue of Article of War 53, 10 U. S. C. 1525, by first raising it just one day prior to the Circuit Court's appellate review. By this means it is attempting to secure another opportunity to again find itself sacrosanct in a second appellate review. The Court of Appeals erred in adopting such construction. The United States Su-

preme Court, in a similar situation, found in *Hormel v. Helvering,* 312 U. S. 552, 556, 1940;

> "Ordinarily an appellate court does not give consideration to issues not raised below for our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevent to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence * * * The Supreme Court said that the Court of Appeals should pass by, with decision, questions not raised below * * * unless exceptional circumstances that would result in injustice so compel."

Further reiterating the necessity of raising all the questions, except jurisdiction, below before they can be considered on appellate review, the courts have held: The Supreme Court of the United States will not consider a question not raised below. *Pacific State Box & Basket Co. v. White,* 296 U. S. 176. Objections not raised in the court below will not be considered in the Supreme Court. *Sonzinsky v. U. S.,* 300 U. S. 506. The Supreme Court will not consider a point first raised by the petition for certiorari. *Helvering v. Minnesota Tea Co.,* 296 U. S. 378. A question raised for the first time by assignment of error in the U. S. Supreme Court will not be considered by it. *White River Lumber Co. v. Arkansas ex rel. Applegate,* 279 U. S. 692. Objections on Federal grounds not presented by the record or passed upon by the State Court will not be considered in the Supreme Court. *Susquehanna Power Co. v. State Tax Commission,* 283 U. S. 291. The Commissioner of Internal Revenue is not entitled to have a decision in the Supreme Court of a point upon which he sought no ruling from the Board of Tax Appeals or the Circuit Court of Appeals. *Helvering v. Tex-Penn Oil Co.,* 300 U. S. 481.

One who remains silent when he should have spoken will not be heard when he should be silent. *Hayward v. Eliot National Bank,* 96 U. S. 611. One who was silent when he should have spoken cannot be permitted to speak at a later period after conditions have altered as regards the other party. *U. S. v. Shrewsbury,* 23 Wall. 508. The respondent, having failed by his silence, to insert the issue of Article of War 53, 10 U. S. C. 1525, into the District Court hearing, is thereby estopped from asserting it in the appellate hearing and especially is this so when petitioner's release has already been secured in the District Court.

The Court of Appeals, below, committed error in considering said issue, and disregarding the merits of the case. This departure from the accepted standards of judicial procedure warrants this Court's intercession and correction.

CONCLUSION.

The writ of certiorari should issue.

Respectfully submitted,

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